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No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER, AND
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE KENTUCKY SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE KENTUCKY SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief amicus curiae is filed by the Kentucky School Boards Association with the written consent of the parties pursuant to Supreme Court Rule 37.[1]

INTEREST OF AMICUS CURIAE

The Kentucky School Boards Association ["KSBA"] is a non-profit corporation of school boards from each public school district in Kentucky. The KSBA was founded in 1936 and serves school board members and school districts in such areas as governmental relations, board member development, risk management, legal services, policy services and publications, and community relations. With nine hundred school board members, the KSBA is the largest organization of elected officials in Kentucky. As educational institutions receiving federal financial assistance, the public school districts in Kentucky are subject to the provisions of Title IX. As a result, any decision by the Court regarding school district liability under Title IX will have a direct impact on them.

[1] No counsel for a party authored this brief in whole or in part. The Kentucky School Boards Insurance Trust and Coregis Insurance Company have made a monetary contribution to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

The issue presented in this case is what standard of liability should be utilized in determining when a school district should be held responsible under Title IX for an employee's sexual harassment of a student. Title IX was enacted pursuant to the Spending Clause. As such, only an intentional Title IX violation can result in liability for a monetary award. Additionally, the language of Title IX mandates that only the actions of a school district are relevant in determining whether an intentional violation has occurred. The conduct of a school district's agents alone is insufficient to impose liability. Based on the origin and unique language of Title IX, the appropriate liability standard is one of actual knowledge. A school district should be liable for the sexual harassment of a student by an employee only when a school administrator who has supervisory authority knows of the harassment or a substantial risk of the harassment and fails to act.

ARGUMENT

In *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the Fifth Circuit held that Title IX liability attaches only when a school official with the authority to supervise and intervene receives actual knowledge of a teacher's sexual harassment of a student and thereafter fails to act.[2] The Seventh Circuit adopted

[2] The Fifth Circuit reaffirmed its position in the case on appeal. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1226 (5th Cir. 1997).

the same liability standard in *Smith v. Metropolitan School District*, 128 F.3d 1014 (7th Cir. 1997). The petitioners urge the Court to reject the actual notice standard articulated in *Rosa H.* and *Smith* and to adopt what amounts to a strict liability standard. Because the Fifth and Seventh Circuits are correct in their analysis of Title IX, the Court should acknowledge the appropriateness of the actual notice standard and reject the other standards suggested by the petitioners.

I. No Clear Standard of Title IX Liability Has Yet Been Established.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court recognized that monetary damages are available for Title IX violations. However, the Court did not reach the issue of the standard of liability to be imposed on school districts when such violations are caused by their employees. In fact, while lower courts have generally assumed that sexual harassment of a student by a teacher is sufficient to create a cause of action under Title IX, *Franklin* did not so hold. In *Franklin*, the school board conceded this issue, and as a result, the Court focused on the remedies available and not on whether a cause of action had been presented. *Franklin*, 503 U.S. at 65-66; *see Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1400 n.14 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843). Since the *Franklin* decision, a number of divergent liability theories have emerged. These theories include: (1) the application of agency principles contained in the

RESTATEMENT (SECOND) OF AGENCY;[3] (2) actual knowledge by the school district of the harassment; (3) the imposition of Title VII principles; and (4) strict liability.[4]

While many courts have adopted Title VII principles to analyze Title IX claims, they acknowledge that the Court has not sanctioned this approach. *See, e.g., Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 749 (E.D. Va. 1995) (adopting a Title VII approach even though Supreme Court has not addressed the appropriateness of this strategy). Their primary rationale for applying a Title VII analysis is the lack of case law under Title IX and the convenient abundance of authority under Title VII. As

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[3] Most courts applying this standard rely on RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) which is a two-tort approach. Both the intentional tort of the employee and the negligence of the school district must be demonstrated before school district liability will attach. *See, e.g., Nelson v. Almont Community Sch.*, 931 F. Supp. 1345, 1355 (E.D. Mich. 1996) (essentially a two-tort negligent or reckless conduct standard). However, the Second Circuit and the Department of Education, Office for Civil Rights ["OCR"] advocate a far more sweeping standard pursuant to § 219(2)(d). Under this standard, a school district is liable for a teacher's sexual harassment of a student if the teacher was aided in carrying out the harassment by his or her position of authority. *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); Department of Education, Office for Civil Rights, *Sexual Harassment Guidance ["Guidance"]*, 62 Fed. Reg. 12034, 12039 (1997). The petitioners obviously support the later approach, which can be interpreted broadly to impose strict liability.

[4] While this standard has been adopted by a small minority of federal district courts, it has been rejected by the circuit courts. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

stated in *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996):

> Because Title VII sexual harassment and sexual discrimination principles have been so well litigated, while Title IX has a short historical parentage, courts have and do resort to Title VII standards to resolve sexual harassment claims brought under Title IX.

Id. at 514; *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1044 (1996) ("Because the relevant case law under Title IX is relatively sparse, we apply Title VII by analogy.").

Missing from the equation is any analysis of the language or history of Title IX. Because Title IX is separate and distinct from Title VII in both its content and lineage, the majority of courts have too quickly rushed to embrace Title VII concepts without proper foundation. The Fifth and Seventh Circuits have recognized this inherent flaw and have developed a standard which more appropriately reflects the intent of Congress in enacting Title IX.

II. Actual Notice and Failure to Act Is the Appropriate Standard of Liability.

A. The language and origin of Title IX.

Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

> activity receiving Federal financial assistance. . . .

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). "Program" or "activity" is defined to include all of the operations of a local educational agency, system of vocational education, or other school system. 20 U.S.C. § 1687(2)(B). The congressionally imposed penalty for the violation of Title IX by an education program or activity is "the termination of or refusal to grant or to continue assistance under such program or activity." 20 U.S.C. § 1682.

In *Franklin*, the Court touched on but did not decide whether Title IX was enacted pursuant to the Spending Clause[5] or section 5 of the Fourteenth Amendment.[6] *Franklin*, 503 U.S. at 75. However, strong precedent supports the conclusion that Title IX was legislated solely under the Spending Clause. In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the Court described the nature of Spending Clause legislation:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the

[5] The Spending Clause provides that "Congress shall have the Power To . . . provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

[6] Section 5 of the Fourteenth Amendment provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

> spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

Id. at 17 (citations omitted). Title IX comports with this characterization. Congress expects compliance with Title IX in exchange for the continued receipt of financial assistance. *Davis*, 120 F.3d at 1397-98 (legislative history evidences congressional intent to impose non-discrimination requirement on basis of sex pursuant to Spending Clause).

The similarities between Title IX and Title VI further support the fact that Title IX was enacted pursuant to the Spending Clause. Except for the identified class of protected persons, the language of Title VI is identical to Title IX.[7] Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. While not reaching the issue regarding Title IX, six Justices have determined that Title VI, after which Title IX is modeled, was enacted pursuant to the Spending Clause. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983) (While, J.); *id.* at 636-37 (Stevens, J., dissenting).

[7] In *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), the Court recognized that "Title IX was patterned after Title VI. . . ."

The same must logically be true of Title IX, and this result impacts the appropriate standard of liability.

B. Liability cannot be imposed under Title IX without the existence of intentional discrimination.

In *Franklin*, the plaintiff student alleged that she had been sexually harassed by one of her teachers and further contended that school administrators had *actual* knowledge of the harassment but took no action. *Franklin*, 503 U.S. at 64-65. Under such circumstances, the Court had no difficulty determining that the plaintiff had stated a cause of action for which monetary damages were available. *Id.* at 74-75. However, in reaching this conclusion, the Court discussed the importance of distinguishing between intentional and unintentional statutory violations when legislation has been promulgated under the Spending Clause. The Court stated:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. . . . The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See id.*, at 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

Id.[8]

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[8] The Court's reference in *Pennhurst* is to the following language: "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981).

Because an intentional violation by the institution is required to impose a monetary remedy under Title IX, the Court must reject a standard of liability based on the agency principles contained in the RESTATEMENT (SECOND) OF AGENCY. Section 219 provides:

> WHEN A MASTER IS LIABLE FOR THE TORTS OF HIS SERVANTS
>
> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or speak on behalf of the principal and there was reliance upon the apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

Liability cannot be imposed under § 219(1) because an employee's sexual harassment of a student is never considered within the scope of employment of any reputable business. *Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 563 (1997); *Smith*, 128 F.3d at 1029, n.17. Recognizing this truism, plaintiffs most frequently rely on § 219(2)(b), which requires that

the employer act with negligence or recklessness. *See Stilley v. University of Pittsburg*, 968 F. Supp. 252, 267 (W.D. Pa. 1996). However, negligence or recklessness does not equate to an intentional act.

While a teacher sexually harassing a student no doubt acts with intent, the Spending Clause does not permit this intent to be imputed to a school district which had no knowledge of the harassment. Under Title IX, it is the program or activity which must act with intent, not the teacher, in order for liability to attach. The Seventh Circuit recognized this principle in *Smith:*

> While Smith [the plaintiff] contends that imputing a teacher's intent to the school district limits institutional liability to intentional actions, this argument improperly shifts the focus from the "program or activity," which must have acted intentionally, to the teacher, who in abusing a child clearly acts intentionally, including his intent to keep his unwarranted conduct secret. "We do not agree that a plaintiff can evade Title IX's intent requirement so easily." The appropriate question still must be whether the "program or activity" acted with intent, because as held above, only a grant recipient – a recipient of grant funds to run a "program or activity" – can violate Title IX. Thus, it must be the grant recipient – an institution or agency having administrative control over the school – that discriminates against the plaintiff.

Smith, 128 F.2d at 1028 (quoting *Rosa H.*, 106 F.3d at 652). Because § 219(2)(b) does not require that the school district act intentionally, this standard has no place in any Title IX analysis.

Title VII principles are also based on agency law and are likewise inapplicable. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) ("Congress wanted courts to look to agency principles for guidance in this area."). Under Title VII, employers are strictly liable for quid pro quo harassment and are liable for hostile work environment harassment if they knew or should have known of the harassment and failed to take appropriate remedial action. *Stilley*, 968 F. Supp. at 266. Quid pro quo strict liability requires no knowledge or intent on the part of the school district. Identical to § 219(2)(b) of the RESTATEMENT, the Title VII "should have known" standard is based on negligence. *Smith*, 128 F.3d at 1028-29 (citing *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990)). Thus, neither the Title VII strict liability standard nor the "should have known" standard demands the intent required by the Spending Clause. *Id.; Rosa H.*, 106 F.3d at 655-56. For this reason, Title VII principles must be rejected in favor of an actual knowledge standard which will give meaning to the limitations imposed by the Spending Clause.

C. The language of Title IX limits intentional violations to the actions of the funding recipient.

In addition to the restrictions created by the Spending Clause, the language of Title IX evidences that Congress did not intend for school districts to be vicariously liable for the acts of their agents under principles of agency law. Title IX prohibits discrimination "under any education program or activity" receiving federal funds. "Program or activity" is defined to mean the operations

of "a local educational agency." 20 U.S.C. § 1687. Agents are not included in this definition. Moreover, the Title IX regulations define "recipient" to mean "any public or private agency, institution, or organization . . . to whom Federal financial assistance is extended . . . and which operates an education program activity which receives or benefits from such assistance. . . . " 34 C.F.R. § 106.2(h). Again, agents of such an entity are not mentioned.

As both the Fifth and Seventh Circuits recognized in *Rosa H.* and *Smith,* the omission of agents from the definition of "education program or activity" is significant. In *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), the Court discussed the appropriate standard of liability for hostile work environment sexual harassment under Title VII. While declining to issue a definitive rule, the Court concluded that "Congress wanted courts to look to agency principles for guidance in this area." *Id.* at 72. This determination was based on the fact that Congress specifically elected under Title VII to define "employer" broadly to include "any agent." 42 U.S.C. § 2000e(b). Embracing the Court's reasoning in *Meritor,* lower courts adopted the "knew or should have known" standard in analyzing hostile work environment cases. *Rosa H.,* 106 F.3d at 654; *Smith,* 128 F.3d at 1023-24.

The rationale upon which the Court relied in approving the application of agency principles in Title VII actions is not present under Title IX. Title IX does not define recipients broadly to include the agents of those recipients. Thus, the conduct which must be scrutinized under Title IX is that of the school district. The language of Title IX does not permit the extension of this inquiry to

the acts of employees who have no administrative control, such as teachers. Vicarious liability simply has no place in the Title IX analysis.

D. Title IX requires the actual notice of a school administrator who has the authority to act before liability can attach.

Because Title IX requires intentional discrimination and because intent cannot be imputed to the school district under any theory of vicarious liability, the school district itself must know of the harassment or of a substantial risk of the harassment and fail to act before it will be liable. In examining the meaning of actual knowledge under this standard, the Fifth Circuit likened this type of notice to the deliberate indifference concept under § 1983.

These cases construing the test for deliberate indifference are helpful because they highlight the distinction between an intentional wrong and a wrong that flows from mere neglect. As we have explained, Title IX liability depends on a school district's act of discriminating on the basis of sex. Just as a prison official has not punished an inmate unless he actually knows of a danger to the inmate and chooses not to alleviate the danger, a school district has not sexually harassed a student unless it knows of a danger of harassment and chooses not to alleviate that danger. Although drawn from a different body of law, *Farmer* and *Hare* clarify the indispensable role that deliberate action plays when liability stems from intentional conduct such as punishing or discriminating.

Rosa H., 106 F.3d at 659 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc)).

In *Rosa H.*, the Fifth Circuit further considered who in the school district could receive actual notice sufficient to constitute notice to the school district. The court devised a middle ground between two extreme positions: (1) only school board members and (2) any school employee other than the harasser. *Id.* at 659-60. The Fifth Circuit concluded that the actual knowledge of any school official who has supervisory authority over the harasser and has the power to act to end the harassment is equivalent to the actual knowledge of the school district. Thus, if this official fails to act after receiving actual notice, the school district can be legally responsible for the inaction under Title IX. The Seventh Circuit adopted the same standard in *Smith*, 128 F.3d at 1034.

The Fifth and Seventh Circuits have articulated the appropriate standard for imposing Title IX liability on school districts. This standard recognizes that students have the right to be free from sexual harassment by teachers and at the same time, assures school districts that they will not be held responsible for conduct about which they had no knowledge and no opportunity to cure. Any less stringent liability standard imposes a financial risk which Congress did not intend[9] and which

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[9] Unlike Title VII, Title IX has no liability limits. The Civil Rights Act of 1991 was passed a year before the *Franklin* decision, recognizing that monetary damages were available under Title IX, and does not apply to Title IX. 42 U.S.C. § 1981a.

school districts cannot absorb. Contrary to the petitioners' assertion, school districts are not the absolute insurers of student safety. *Doe*, 103 F.3d at 510 (no constitutional duty to protect students). Under Title IX, they should only be liable for those acts over which they have the ability to exercise control.

III. The Strict Liability Standards Suggested by the Petitioners Are Not Appropriate.

The petitioners urge the Court to adopt one of two strict liability approaches in analyzing Title IX claims. The petitioners first suggest that a school district should be automatically liable for the sexual harassment of a student if it has failed to adopt and disseminate grievance procedures for Title IX complaints. This approach imposes school district liability regardless of whether the student would have utilized the grievance procedures if they existed. As an alternative, the petitioners argue that school district liability should attach if the teacher was aided by his or her position in carrying out the harassment. Because both approaches are inconsistent with the intentional discrimination requirement of Title IX and are in fact more stringent than Title VII agency principles, they must be rejected.

A. The absence of grievance procedures should not invoke automatic liability.

The Title IX regulations require that school districts adopt and publish grievance procedures for the resolution of student and employee complaints pertaining to

discrimination on the basis of sex.[10] 34 C.F.R. § 106.8(b). The petitioners reason that liability should be absolute if a school district is not in compliance with this requirement at the time the sexual harassment of a student occurs. The Department of Education, Office for Civil Rights ["OCR"], concurs with this position. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance ["Guidance"]*, 62 Fed. Reg. 12034, 12040 (1997).[11]

The approach which the petitioners advocate is inconsistent with the intentional discrimination requirement mandated by the Spending Clause. The failure of a school district to adopt grievance procedures is not a discriminatory act in and of itself. *Does v. Covington County Sch. Bd.*, 969 F. Supp. 1264, 1274 (M.D. Ala. 1997) ("An institution's failure to comply with a procedural regulation, such as the failure to promulgate a grievance procedure, is not an action which discriminates on the basis of sex."). Moreover, the lack of such procedures constitutes "negligence at best." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1420 (N.D. Iowa 1996). As previously discussed, negligence is insufficient to create Title IX liability because of the restrictions imposed by the Spending Clause.

While the petitioners rely on *Meritor* in support of their argument that strict liability should attach absent

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[10] While the Title IX regulations are quite extensive, at no point do they mention sexual harassment or provide any guidance in this difficult area.

[11] Guidelines issued by an administrative agency may provide guidance to the courts but are not controlling. *Meritor*, 477 U.S. at 65.

grievance procedures, *Meritor* did not so hold. In *Meritor*, the employer argued that it should be insulated from liability because it had a policy and grievance procedure against harassment. While the Court found this evidence to be relevant, the Court did not consider it dispositive. *Meritor*, 477 U.S. at 72. Additionally, even though the EEOC argued that an employer without an adequate policy should be automatically liable for the sexual harassment of an employee, the Court declined to adopt this or any other rule. *Id.* at 71-72. Thus, even should the Court endorse the application of Title VII agency principles in Title IX cases, liability should not attach simply because the school district has not adopted grievance procedures. Just as the existence of such procedures was not sufficient in *Meritor* to insulate the employer from liability, the lack of such procedures should not render liability absolute.

B. Pure agency principles create strict liability and should not be adopted.

The OCR acknowledges that sexual harassment of a student can occur despite the "best efforts" of school personnel. *Guidance*, 62 Fed. Reg. at 12034. Despite this recognition, the OCR has adopted sweeping agency standards which virtually assure that school districts will be liable any time an employee sexually harasses a student. The petitioners also endorse these standards.

According to the OCR, school districts will always be liable for quid pro quo harassment, which occurs when a school employee conditions a benefit (e.g., grades) upon the receipt of sexual favors. While this standard is consistent with Title VII agency principles, the OCR further

asserts that school districts will be strictly liable for an employee's hostile environment sexual harassment if the employee:

> (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school whether or not the employee acted with authority); or
>
> (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.

Id. at 12039. Only in those rare situations in which these standards are inapplicable does the school district's response to the harassment have any relevancy.[12]

Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997), illustrates the far-reaching implications of the OCR's position. In *Kracunas*, two students complained that a college professor made inappropriate comments of a sexual nature to them but did not make any conditional threats or promises. In adopting a standard for the review of Title IX cases, the Second Circuit stated:

> Thus, we hold that if a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory

[12] The OCR is also of the opinion that school districts can be liable under Title IX for peer-to-peer sexual harassment. *Guidance*, 62 Fed. Reg. at 12039. The Fifth and Eleventh Circuits have soundly rejected this approach. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 165 (1996); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

> relationship to further the harassment of the student, the college is liable for the professor's conduct.

Id. at 88. This approach is obviously based on § 219(2)(d) of the RESTATEMENT.

The Second Circuit is the only court of appeals to adopt pure agency principles to resolve Title IX cases.[13] The fallacy in this approach is that it creates in practice a standard of strict liability.

> It is important to note that agency principles would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student. In addition to § 219(2)(b) of the *Restatement*, which makes a master liable when he acts negligently, courts could rely on § 219(2)(d), which creates liability whenever the servant is "aided in accomplishing the tort by the existence of the agency relationship." The teacher's status as a teacher often enables the teacher to abuse the student. Whether his power came from the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children, John Contreras's [the teacher] chances of initiating a sexual relationship with an adolescent such as Deborah were enhanced when the school district hired him.

Rosa H., 106 F.3d at 655; *Smith*, 128 F.3d at 1029-30.

[13] Unlike other courts of appeal, the Second Circuit apparently also analyzes Title VII cases under pure agency principles. *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994).

While we assert that the appropriate liability standard in Title IX cases is actual knowledge, Congress surely did not intend for school districts to be strictly liable for the sexual harassment of students when it enacted Title IX. The eradication of discrimination based on sex is a noble goal. However, it is unreasonable to hold communities financially responsible for the criminal acts of a teacher through the state and local taxes they pay to fund local school systems. *Smith,* 128 F.3d at 1030-31. "Simply put, strict liability is not part of the Title IX contract." *Canutillo Indep. Sch. Dist. v. Leija,* 101 F.3d 393, 399 (5th Cir. 1996), *cert. denied,* ___ U.S. ___, 117 S. Ct. 2434 (1997). No justification exists for imposing liability simply because the school district employs the harasser. At the very minimum, some degree of fault must be present. As a result, the Court should reject the pure agency principles suggested by the petitioners.

CONCLUSION

For the reasons expressed herein, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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